Supreme Court, U. S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-758

CHARLES T. SINK,

Petitioner,

v.

THOMAS S. KLEPPE,

Secretary of the Interior,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES T. SINK,

Petitioner,

v.

THOMAS S. KLEPPE,

Secretary of the Interior,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Charles T. Sink, respectfully seeks the issuance of a writ of *Certiorari* to review the opinion of the Court of Appeals for the Fourth Circuit holding Mr. Sink subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (Appendix A) has not yet been reported.[1] The decision of the Interior Board of Mine Operations Appeals, herein, (Appendix C) is reported at 5 IBMA 217. The opinion and order of the Administrative Law Judge (Office of Hearings and Appeals of the United States Department Of The Interior), is not formally reported and is contained in Appendix D.

JURISDICTION

The judgment of the Court of Appeals affirming the opinion and order of the Interior Board of Mine Operations Appeals was entered 6 July 1976. A timely Petition For Rehearing was filed on Mr. Sink's behalf, and denied on 3 September 1976 (Appendix B). The jurisdiction of this Court is sought pursuant to the provisions of 28 U.S.C. §1254(1), as specifically provided for in Section 106(d) of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 754; 30 U.S.C. §816[d]).

QUESTIONS PRESENTED

1. Can a coal mine, and its owner-operators, the products of which do not regularly enter interstate commerce and the products or operations of which do not affect that commerce, be subjected to federal regulation?

2. Did Congress intend the Federal Coal Mine Health and Safety Act of 1969 to apply to owner-operated mines with no employees?

1. Another decision in this litigation is reported: *Sink* v. *Morton* 529 F.2d 601 (4th Cir. 1975). It is not relevant, however, to this petition.

STATUTES INVOLVED

The pertinent provisions of the Federal Coal Mine Health and Safety Act of 1969, involved are set forth in the Statutory Appendix to this Petition (p. i-vi).

STATEMENT OF THE CASE

The facts were stipulated below (Appendices F and G).

Charles Sink owns approximately 365 acres of underground coal near Boggs in central West Virginia (Appendix F, p. 1f, No. 1). In partnership with his son, he mines his land in Sink Coal Company, Mine No. 1. There are no employees (Appendix F, p. 2f, No. 5). From September 1973, when Mr. Sink began operating the mine, through November 1974, production averaged ten tons of coal per day. At its peak production level not more than thirty tons a day were minded (*Id.*, No. 6). Approximately ninety percent of the product of Sink Coal Company, Mine Number 1, is sold at the mine site to local purchasers who haul it away themselves for local consumption (*Id.*, No. 7). Mr. Sink builds a stockpile of his coal away from the mine site during the summer months because the mine is inaccessible during the winter months (*Id.*, No. 8). He has no knowledge of the destination or use of his mine's product after it is sold (Appendix G, p. 6g).

The Government selected, as a basis for its commerce jurisdiction, the six-month period from June through November, 1974, the height of the oil embargo effected by the oil exporting countries. During this period, and its resultant extraordinary demand on coal production, three purchases were made by Courtney Foos from the stockpile (*Id.*, pp. 6g-8g). It was not until the pretrial hearing before the Administrative Law Judge in February 1976, that the Petitioner became aware that Mr. Foos was a Virginia coal broker (*Id.*, pp. 4g-8g). After this hearing the government established that Mr. Foos shipped the 738 tons of coal he had purchased from Mr. Sink to Pennsylvania (*Id.*, p. 9g).

In November 1974, the federal authorities inspected the Sink mine. As a result, the notices under section 104(b) of the Act (83 Stat. 750; 30 U.S.C. §814[b]) ultimately resulting in this Petition were issued (Appendix D, p. 3d).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE FOURTH CIRCUIT BELOW IS IN DIRECT CONFLICT WITH THE RULE OF LAW FOLLOWED IN THE THIRD CIRCUIT ON THE ISSUE OF APPLICABILITY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 TO OWNER-OPERATED MINES WITHOUT EMPLOYEES.

The Fourth Circuit, in its decision below, has affirmed an opinion that ". . .the intent of the Federal Coal Mine Health and Safety Act as manifested in the legislative history and language of the Act is to be broadly construed to apply its provisions to an owner-operated coal mine" (Appendix C, p. 7c). Thus it held this mine in West Virginia subject to the Act.

In deciding whether federal coal mine inspectors had authority to inspect an owner-operated mine in Pennsylvania, Judge Gourley of the Western District held ". . .that it was not a part of the legislative intent of Congress to subjugate a one-man, owner-operated coal mine to the requirements of the Act." (*Morton* v. *Bloom* 373 F.Supp. 797, 798 [W.D.Pa. 1973]). The government did not appeal the *Bloom* decision though it was the first reported case interpreting Section 4 of the Act (83 Stat. 744; 30 U.S.C. §803). *Bloom* is being followed as the law on the subject in the Third Circuit (See: *Morton* v. *Pappal* _____F.Supp._____ [W.D.Pa. 1975]; Appendix E).

This clear conflict was, moreover, recognized in the case at bar by the Administrative Law Judge when he expressly declined to follow *Bloom* (Appendix D, pp. 8d-9d).

Conflicts between Circuit Courts of Appeal and Federal District Courts have been a basis for the exercise of *Certiorari* jurisdiction where the question involved is an important one,

Shapiro v. *United States* 335 U.S. 1, 4 (1948); *United States* v. *Constantine* 296 U.S. 287, 290 (1935). The question involved here is essential to an unequivocal understanding of the Act's applicability to owner-operated mines having no employees. Can a man, without the supervision of the Federal government, mine the land which he ownes in the Western District of Pennsylvania, while his brother, similarly situated, but in the Southern District of West Virginia, cannot?

From the declaration of purpose (83 Stat. 742, 30 U.S.C. §801) and the definition of "miner" in Section 3 (83 Stat. 743, 30 U.S.C. §802) of the Act, the government concludes that Congress did not intend to *exclude* Petitioner's mine from regulation (Appendix C, pp. 6c-7c; Appendix D, pp. 9d, 11d-12d). Petitioner is in no way seeking to have this Court engraft an exclusionary, or exemption, clause to Congress' work. Rather, we argue, as *Bloom* held, that the Congress never intended to *include* a mine without employees within the scope of its regulatory scheme.

While it is not particularly instructive to review the litany of incongrous applications of the Act to a mine with no employees (*e.g.*, *Bloom*, at 798-799), it is extremely germane to focus on one.

From the initial remarks of Senator Williams in the floor debates (*Legislative History of the Federal Coal Mine Health and Safety Act of 1969 [Public Law 91-173]*, 94th Cong. 1st Sess. Committee Print, Committee On Labor And Public Welfare United States Senate, p. 239, hereafter, *Leg. Hist.)*, as well as in all Committee hearings (*infra.*), it was clear that Congress was concerned with working conditions in the Nation's coal mines. The legislators wanted to insure that miners would be provided with a safe and healthy place to work by their *employers*. (Cf. the Occupational Health and Safety Act of 1970, 84 Stat. 1590, *et. seq.*, 29 U.S.C. §§651-678) To catalogue the support for this proposition would be to reprint the legislative history.

This conclusion that Congress intended only to regulate

conditions in mines where there are employees is compelled by review of the Act's Black Lung Benefits provisions (83 Stat. 792, 30 U.S.C. §901, *et seq.*). Since Mr. Sink is not "*employed*" in an underground coal mine, he is not entitled to receive any black lung benefits. He is not covered by the Act.

The anomalous result of subjecting Petitioner to pervasive federal regulation while denying him any federal benefits under the same Act because of his employment status is avoided in the Third Circuit, but reached in the Fourth. The Act's history and Congress' purpose supports the former.

The irreconcilable conflict on this significant question of applicability of the Act to a mine without employees should be resolved by this Court.

2. THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION ON THE APPLICABILITY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 4 of the Federal Coal Mine Health and Safety Act of 1969 (Appendix, p. ii) has not been previously reviewed and interpreted by this Court. This Section contains alternate grounds for extending federal regulations under Congress' commerce power.

If a coal mine's products "enter commerce",[2] or if its products or operations "affect commerce", it is subject to federal regulation. The Fourth Circuit correctly concluded that the products of the Sink mine did not "affect" commerce within the Act's meaning (Appendix A, p. 2a). The substantial question presented by this Petition turns on the meaning of the "enter commerce" phrase. To resolve it, the language must be

2. "Commerce" being, of course, defined as interstate commerce (83 Stat. 743, 30 U.S.C. §802[b]).

read in light of the Act's purpose and legislative history. *Gulf Oil Corp.* v. *Copp Paving Co.* 419 U.S. 186, 197 (1974).

Applicability sections of the previous Federal Coal Mine Safety Acts all related to mines whose products "regularly entered", commerce (1941 Act: 55 Stat. 177; 1952 Act: 66 Stat. 693; 1966 Amendment: 80 Stat. 87). In over 3200 printed record pages of Senate hearings, House hearings, and floor debates there is no suggestion that Congress intended to broaden the applicability of the 1969 Act to mines whose products did not "regularly" enter commerce.

In fact, in the section-by-section analysis of Section 4 of the Bill (S.2917) as approved by the Conference Committee (H. Conf. Rept. 91-761, 91st Cong. 1st Sess.), the only explanation of coverage under the new law is that "...all coal mines the operations or products of which affect commerce...are subject to this act." (*Leg. Hist.*, p. 1599).

It is significant that the legislative history shows Congress' intent was to insure coverage of all mines whose products or operations affected interstate commerce. Here, of course, the Fourth Circuit found, as a matter of law, that the Petitioner's did not. (Appendix A, p. 2a).

To read the language of the Act without giving weight to congressional intent to regulate only mines whose products regularly enter commerce, as was done below, is to subject, forever, to substantial federal regulation a mine with a single movement of its product across a state boundary. This Court has read such a result out of similar statutory language (See: Section 3, below, of this Petition).

Congress, itself, recognized that the legislation would not reach "all" mines (Coal Mine Health and Safety Act of 1969, Hearings, Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Vol. 2, p. 569). Indeed it could not (See: S.Rept. No. 1223, 82nd, Cong., 2nd. Sess., Section [3]).

The important question raised by the decisions below on

the applicability Section of the Act should be resolved by this Court.

3. THE APPLICATION BY THE COURT BELOW OF THE REQUIREMENTS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 TO A MINE WHOSE PRODUCTS ONLY ABERRANTLY ENTERED COMMERCE IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT.

This Court held a local publisher accountable for overtime wages under the Fair Labor Standards Act of 1938 (52 Stat. 1060) because one-half of 1% of its publication was *regularly sold in interstate commerce.* However, the Court speaking through Justice Douglas assumed that "...sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included [in the Act's coverage]" *Mabee v. White Plains Publishing Co.* 327 U.S. 178, 181 (1946).

Movement of 738 tons of Sink Coal Co. Mine No. 1, product in interstate commerce was a result of sales even less than "sporadic or occasional". It was the result of three, small sales to someone who only later proved to be an out-of-state purchaser, and even later, admitted moving the purchased coal in an interstate shipment. These three sales constitute the sole interstate movement of Sink coal since September, 1973. The Government does not contend otherwise. [3]

3. The sales to Courtney Foos were the only ones the government could define as being interstate. Indeed, they were the only interstate sales. The confusion in the Stipulation of Facts (Appendix F, pp 2f, Nos. 6 and 7; and 4f, No. 2) is best explained be referring to pp. 44-45 of the transcript of the hearing before ALJ Kennedy, portions of which are reproduced in Appendix G to this Petition. While the 90% figure seems to have been arrived at as a matter of expediency, it is plain that neither the government nor Mr. Sink contended that there were any interstate shipments other than the 738 tons resulting from the 3 sales to Foos, from 1973 to the date of the hearing 6 February 1975 (Appendix G, pp. 2g-3g).

The decisions below conclude that the Sink mine is a proper object of federal regulation under the 1969 Act, because three sales were made to an out-of-state purchaser who later moved the product in interstate commerce. Basing, as they do, jurisdiction on unique, rather than regular, contact with the channels of interstate commerce they are in direct conflict with an applicable decision of this Court.

CONCLUSION

For the reasons stated, the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

The Federal Coal Mine Health And Safety Act of 1969 reads in pertinent part as follows:

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

83 STAT. 742, 30 U.S.C. §801
[S. 2917]

FINDINGS AND PURPOSE

Sec. 2. Congress declares that—

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the

health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the industry.

***

83 STAT. 743, 30 U.S.C. §802

DEFINITIONS

Sec. 3. For the purpose of this Act, the term—

(b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof;

***

(g) "miner" means any individual working in a coal mine;

***

83 STAT 744, 30 U.S.C. §803

MINES SUBJECT TO ACT

Sec. 4. Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

***

83 STAT. 750, 30 U.S.C. §814

FINDINGS, NOTICES, AND ORDERS

(b) Except as provided in subsection (i) of this section,

if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

***

83 STAT. 754, 30 U.S.C. §816

JUDICIAL REVIEW

(d) The judgment of the court shall be subject to review only by the Supreme Court of the United States upon a writ of certiorari or certification as provided in section 1254 of title 28, United States Code.

***

83 STAT. 792, 30 U.S.C.§§901

TITLE IV— BLACK LUNG BENEFITS

PART A—GENERAL

Sec. 401. Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's underground

coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to the disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Sec. 402. For purposes of this title—

(a) The term "dependent" means a wife or child who is a dependent as that term is defined for purposes of section 8110 of title 5, United States Code.

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in an underground coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in an underground coal mine.

(e) The term "widow" means the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion, who has not remarried.

(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, but such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.

The 1941 Federal Coal Mine Safety Act contained the following provisions permitting federal inspection of mines:

55 STAT. 177

AN ACT

Relating to certain inspections and investigations in coal mines for the purpose of obtaining information relating to health and safety conditions, accidents, and occupational diseases therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, The the Secretary of the Interior, acting through the United States Bureau of Mines, is hereby authorized and empowered to make or cause to be made annual or necessary inspections and investigations in coal mines the products of which regularly enter commerce or the operations of which substantially affect commerce—

***

In the 1952 Federal Coal Mine Safety Act similar jurisdictional language was used:

66 STAT. 693

"Sec. 202. (a). For the purpose of determining whether a danger described in section 203 (a) exists in any mine the products of which regularly enter commerce or the operations of which substantially affect commerce, or whether any provision of section 209 is being violated in any such mine, or whether any such mine is a gassy mine as prescribed in section 203 (d), the Director shall cause an inspection of each such mine to be made by a duly authorized representative of the Bureau at least annually. The Director shall also make, or cause duly authorized representatives of the Bureau to make such special inspections of such mines as may be required by section 203 (c) and section 206, and such other inspections of such mines as he deems necessary for the proper administration of this title.

***

The 1966 amendment to the 1952 Act did not change that language:

80 STAT. 87

(b) Section 202 of the Federal Coal Mine Safety Act (66 Stat. 693; 30 U.S.C. 472) is amended as follows:

(1) Subsection (a) is amended by striking out the reference to "section 203 (d)" and inserting in lieu thereof "section 203 (f)"; and by striking out the reference to "section 203 (c)" and inserting in lieu thereof "section 203 (c) and (d)".

APPENDIX A

OPINION BELOW, FOURTH CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2278

Charles T. Sink,

Petitioner,

v.

Thomas S. Kleppe, Secretary of the Interior - Mining Enforcement and Safety Administration (MESA),

Respondent.

Petition for Review of an Order of the Interior Board of Mine Operations Appeals.

(Argued June 10, 1976 Decided July 6, 1976)

Before Bryan, Senior Circuit Judge, Widener, Circuit Judge and Kunzig, Judge, United States Court of Claims.*

---

*Sitting by designation.

PER CURIAM:

Charles T. Sink, owner-operator of an underground coal mine with no employees, seeks review of a determination by the Interior Board of Mine Operations Appeals that his mine is included by the following language and, therefore, subject to regulation pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 USC 801, *et seq.*:

> "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." §803[1].

Contending that his mine is not embraced by this section, Sink urges chiefly that since less than **all** of his coal products did "enter commerce"[2], his coal mine is not within the intendment of the Act.

Upon consideration of the stipulation of the facts, as well as of the major and all other arguments put forth by the appellant in his brief and in oral presentation, we perceive no error of the Interior Board of Mine Operations Appeals in its interpretation and application of the Act here. The decision on appeal holding Charles T. Sink in violation of the Act will not be disturbed.

Affirmed.

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1. This case is a sequel to *Charles Sink* v. *Rogers Morton*, Secretary of the Interior, __F2d__ (4 Cir. 1975), *q.v.*
2. That his products did "affect" commerce within the meaning of the Act was not sustainable.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2278

Charles T. Sink

v.

Thomas S. Kleppe

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE COURTH CIRCUIT

No. 75-2278

Charles T. Sink,

Petitioner,

v.

Thomas S. Kleppe, Secretary of the Interior
Mining Enforcement and Safety Administration
(MESA),

Respondent.

ORDER

Upon consideration of the petition for rehearing, by counsel,

IT IS ORDERED that the petition is denied.

For the Court—By Direction

/s/ WILLIAM K. SLATE, II
Clerk

FILED

Sep. 3, 1976

U.S. Court of Appeals
Fourth Circuit

APPENDIX C

OPINION AND ORDER, INTERIOR BOARD OF MINE OPERATIONS APPEALS

APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

CHARLES T. SINK

IBMA 75-74 Decided October 31, 1975

Appeal by Charles T. Sink from a decision by Administrative Law Judge Joseph B. Kennedy declaring the applicant's coal mine subject to the Federal Coal Mine Health and Safety Act of 1969 in a proceeding brought pursuant to section 105(a) of the Act.

Affirmed in result.

1. Federal Coal Mine Health and Safety Act of 1969: Generally—Federal Coal Mine Health and Safety Act: Mines Subject to the Act

In an underground coal mine owned and operated by two partners who are also the only miners in such mine, there being no employees, such owner-operators and the mine are, nevertheless, subject to the provisions of the Act, where the coal extracted from such mine enters commerce by being transported interstate.

APPEARANCES: William W. Talbott, Esq., for appellant, Charles T. Sink; John M. Allen, *Deputy Associate Solicitor*, and Robert J. Phares, *Trial Attorney* for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

This appeal raises the issue of whether the subject coal mine falls within the scope of section 4 of the Federal Coal Mine Health and Safety Act of 1969 (the Act) and is thus subject to the provisions thereof. 30 U.S.C. §803 (1970). The Administrative Law Judge (Judge) rendered his decision in this case on May 19, 1975, based upon a joint motion for summary decision and waiver of an evidentiary hearing together with a written stipulation of facts containing a statement of issues presented in the administrative proceeding. The Judge concluded that "small, owner-operated coal mines are covered by and subject to the provisions of the Act" and that coal produced by the Sink Mine is regularly sold through interstate means and enters the stream or flow of interstate commerce within the meaning of sections 3(b) and 4 of the Act. 30 U.S.C. §§802(b) and 803. Whereupon, he declared that the Secretary of the Interior acting through the Mining Enforcement and Safety Administration (MESA) has the power and authority under the Act to regulate health and safety practices in the Sink Mine and denied the Application for Review without prejudice to the operator's right to challenge the validity of the section 104(c) notices and orders on other grounds in any subsequent penalty proceeding. In his appeal to the Board, appellant Charles T. Sink (Sink) argues in substance that the history and language of the Act show that Congress did **not** intend that an owner-operated coal mine with no employees be covered by the Act. He also argues that the subject coal mine does not, in fact, have any substantial effect on interstate commerce. For reasons cited below, we affirm the Judge's denial of Sink's Application for Review.

Procedural and Factual Background

On November 5, 1974, James R. Elkins, a duly authorized inspector of MESA, conducted an inspection of the Charles T. Sink Mine located near Boggs, West Virginia, and owned and operated by Sink in partnership with his son, Bill. No other persons work in the Sink Mine. The parties, *inter*

alia, stipulated to the following facts: that the entire production of the Sink Mine from September 1973 to November 1974 was 2,947 tons; and that between June 1 and November 4, 1974, Sink sold 738 tons or approximately twenty-five percent (25%) of the coal produced in the Sink Mine to Courtney Foos who delivered it to customers located in the State of Pennsylvania, the total value of the amount shipped being approximately $40,000.

As a result of the November 5 inspection, the inspector issued one notice of violation and four orders of withdrawal pursuant to section 104(c) of the Act, 30 U.S.C.§814(c) (1970).

On December 5, 1974, the United States District Court for the Southern District of West Virginia issued an injunction[1] enjoining the Secretary of the Interior from enforcing said notice and orders until such time as an administrative determination of the issues involved was made pursuant to the provisions of the Act.

The Judge's decision was issued on May 19, 1975, and appealed by Sink on June 9, 1975. The notice of appeal included a request for Temporary Relief. On June 23, 1975, the Board dismissed the application for temporary relief as unnecessary since the District Court's Memorandum Order of December 5, 1974, had already enjoined the Secretary from enforcing the notice and orders until a final administrative determination of the issues herein raised on appeal.

Sink filed a Memorandum and Brief in support of his appeal on June 30, 1975. The Mining Enforcement and Safety Administration (MESA) filed a reply brief on July 11, 1975.

On October 6, 1975, Sink filed a petition for temporary injunction in which he advised the Board that the injunction issued by the U.S. District Court was vacated by the U.S. Court of Appeals for the Fourth Circuit on October 1, 1975.

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1. *Charles T. Sink* v. *Morton*, Civil Action No. 74-495-CH.

Contentions of the Parties

Both parties cite section 4 of the Act as the provision central to this case. It reads in pertinent part:

MINES SUBJECT TO ACT

> Sec. 4. Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce * * * shall be subject to the provisions of this Act.

30 U.S.C §803 (1970).

Sink argues in substance 1) that the history and language of the Act exempts one-man, owner-operated coal mines, and 2) that his coal mine does not, in fact, fall within the classification of a coal mine pursuant to section 4 of the Act. In support of the first contention, Sink alleges that the Act's language contains requirements which cannot be met by an operator who mines his own coal (Br. 5-8). In support of the latter, Sink relies upon *Morton* v. *Bloom*, 373 F. Supp. 797 (W.D. Pa. 1973), in which a Federal District Court found that all of the coal produced from the particular owner-operated mine was sold exclusively within Pennsylvania, the state of the mine's situs. That Court employed the test of whether the operator's coal or his operations "affected commerce" and decided in the negative. Although Sink concedes the fact that 25 percent of his production was sold to a broker in West Virginia who then sold it to Pennsylvania consumers, he contends that the transaction with the broker was intrastate as well as intracounty, that he had no knowledge of the destination of this coal at the time of its sale to the broker, and that this small percentage did not substantially affect commerce as contemplated by section 4 of the Act. His brief states in pertinent part:

> All sales of Sink's coal took place not only intrastate but also intracounty. Sink plainly stated he would not attest to

> what happened to the coal after it was sold by him * * * a very small percentage of the coal was carried out of the state by Courtney Foos. The point, however, to keep in mind is that the sale to Foos, as well as all other sales, were (sic) intrastate as well as intracounty. * * * Could one say that such an intrastate sale by Sink to Foos, who admits in his letter he sold to his Pennsylvania customers, be considered as an interstate sale by Sink * * *. (Br. 12-20.)

In its reply brief, MESA contends that the legislative history does not impute a narrow application of the Act's scope, but requires a broad application as evidenced by the elimination of the distinction between gassy and nongassy mines. It further contends that impossibility of compliance with some of the Act's provisions by the owner-miner does not mean that Congress did not intend the Act to apply to owner-operated mines. Finally, it argues that Sink's application of the *Bloom* decision, the issue of which focused solely on whether that particular mine's products *affected* commerce, is inapposite as a coal mine may fall within the purview of the Act if its products *enter* commerce as did 25 percent of Sink's coal production.

Issue Presented on Appeal

Whether the Administrative Law Judge erred in concluding that the Charles T. Sink No. 1 Mine is subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969.

Discussion

Addressing the phrase in section 4 of the Act, *viz.*, "* * * each operator * * * and every miner * * * shall be subject to the provisions of this Act," the Board is certainly cognizant of the apparent inconsistency

inherent therein when applied to a coal mine owned and worked by the same individual. Nevertheless, for reasons hereinafter cited, and as harsh as it may appear at times, we must conclude that Congress manifested no intent to exclude any operating coal mine from the Act solely on the basis of size or number of employees, or on the basis of having no employees.

The historical background and the legislative history of coal mine health and safety laws support this view. In 1952 the predecessor of the current Act, titled the Federal Coal Mine Safety Act, July 16, 1952 (66 Stat. 692), was signed by President Truman with great reluctance as he criticized, *inter alia,* the fact that it exempted mines employing 14 miners or less.[2] In 1966 this exception was explicitly deleted with the passage of the Federal Coal Mine Safety Act Amendments of 1965, March 26, 1966 (80 Stat. 84).[3] Not only are numbers no longer an index to ascribing an exempt status to a small mine, but also the distinction of a gassy, vis-a-vis *(sic),* a nongassy mine. The Act purports to provide the means "to improve the health and safety conditions and practices at *all underground coal mines*"[4] and, as a testament thereof, the House Committee on Education and Labor rejected an amendment proposed by Senator Cooper (Ky.) that would have permitted the use of nonpermissible equipment in nongassy mines.[5] Finally, the United States Court of Appeals for the Fourth Circuit in *Reliable Coal Corporation* v. *Morton,* 478 F.2d 257

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2. *Legislative History, Federal Coal Mine Health and Safety Act,* House Comm. on Education and Labor, 91st Cong., 2d Sess., at 5 (S. Rep. No. 91-411) (Comm. Print, 1970) (hereinafter *Leg. Hist.*).
3. *Leg. Hist.* at 6. Addressing this issue, Senator Jennings Randolph, Chairman of the Senate Committee on Public Works, spelled out the intent of the 1966 Amendment as "to extend the Coal Mine Safety Act provisions to the smaller mines to protect *all* miners." (Emphasis added) *Leg. Hist.* at 212.
4. *Leg. Hist.* at 115.
5. *Leg. Hist.* at 35.

(4th Cir. 1973), plainly stated that the Act's history "* * * demonstrates beyond any doubt that Congress carefully evaluated the issue and determined that the gassy/nongassy distinction should be eliminated * * *.

Section 2(g)(2) of the Act reads:

Sec. 2. Congress declares that--

(g) it is the purpose of this Act * * * (2) to require that each operator of a coal mine and every miner in such mine comply with * * * [mandatory health or safety] standards; * * *.

30 U.S.C. §801(g)(2) (1970).

Section 3(g) of the Act defines "miner" as "any individual working in a coal mine." 30 U.S.C. §802(g) (1970). We find that Sink is an "individual working in a coal mine" and is thus a "miner" for purposes of section 3(g). As owner of the subject coal mine, Sink is also the "operator" thereof pursuant to section 3(d) 30 U.S.C. §802(d) (1970). The Board is of the opinion that the fact that an individual is both a miner and operator does not exempt that individual from the purview of section 2 of the Act. Furthermore, section 2(b) of the Act evidences a concern by Congress not only for the miners but for the "grief and suffering * * * to their families." Accordingly, we conclude that the intent of the Federal Coal Mine Health and Safety Act as manifested in the legislative history and language of the Act is to be broadly construed to apply its provisions to an owner-operated coal mine.

Sink's reliance upon the Board's decision in *Buffalo Mining Company,* 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973) as support for an exemption for an owner-operator mine, because of impossibility of compliance with all

of the provisions of the Act, is misplaced. *Buffalo* did not involve an owner-operator mine, did not apply to exemptions and held only that Congress did not intend a violation to be charged where compliance was impossible due to *unavailability of equipment, materials or qualified technicians.*

[1] Sink's second and major argument circumvents the first and primary classification of section 4 subjecting a mine to the provisions of the Act if its products *enter* commerce. In analyzing section 4, the Board concludes that Congress intended the "enter commerce" and "affect commerce" clauses to be alternatives either of which subjects a mine to the provisions of the Act. Sink in this respect bases his argument for exempt status solely on the *Bloom* decision, discussing at some length reasons why the coal produced from his mine does *not* substantially *affect* commerce. Having carefully read Sink's brief, the Board finds that he has not demonstrated in any meaningful way that coal produced from his mine did *not enter* commerce and that the facts are to the contrary. The instant case on its facts is distinguishable from the *Bloom* decision, the facts of which clearly evidenced coal sold and consumed totally intrastate, thus limiting the issue to whether that mine's product or operation affected commerce. We note that the matter of determining if a mine's coal or operation substantially affects commerce takes into consideration many variables, whereas determining if a mine's coal enters commerce is resolved by the single proof of its entry. The Board notes the parties' stipulation that between September 1973, and November 1974, approximately 25 percent of Sink's coal was sold to Courtney Foos who then sold it to Pennsylvania customers. The Foos transaction accounted for $40,000 of Sink's income realized between those months. The fact that title to the coal passed to Foos before the coal crossed the West Virginia state line did not make Sink's operation any less

a part of interstate commerce.[6] His production of coal which later entered interstate commerce represented one part of the mainstream of economic activity leading to the coal's out-of-state sale.[7] In summary, based upon the foregoing facts, the Board finds that Sink's No. 1 Mine did produce coal that entered the stream of commerce and, accordingly, is subject to the provisions of the Act.

The Board sees no reason to undertake a hearing of Sink's pending motion for temporary relief, since we are making a final decision of this proceeding on its merits before such motion, as a practical matter, could be properly determined.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

6. In *NLRB* v. *Fainblatt,* 306 U.S. 601, 602-603 (1939), the Supreme Court held that transportation across state lines is commerce regardless of whether title to the merchandise passes before or after such transportation.

   It also appears the Supreme Court has put to rest the issue of whether there must be circumstances demonstrating with certainty an out-of-state destination of goods in order to constitute a sale in interstate commerce. In *Campbell* v. *Hussey,* 368 U.S. 297, 298-299 (1961), *reh. den.* 368 U.S. 1005 (1962), it was held that Congress could provide for inspection of tobacco prior to auction sales even though it is not known at the moment of sale whether it is destined for interstate or intrastate commerce.

7. Like the purpose of the Federal Coal Mine Health and Safety Act, the primary objective of the Fair Labor Standards Act articulated in *U.S.* v. *Darby,* 312 U.S. 100 (1941) aimed to establish minimum standards insuring the health and safety of employees, and the introduction of their product into interstate commerce was the means by which Congress asserted its regulatory power over their employers.

CFR 4.1(4)), IT IS HEREBY ORDERED that the Application for Temporary Relief IS DENIED, and that the Judge's decision IS AFFIRMED.

Board of Mine Operations Appeals

By: /s/ Howard J. Schellenberg, Jr.
Howard J. Schellenberg, Jr.
Administrative Judge

I concur:

/s/David Doane
David Doane
Chief Administrative Judge

APPENDIX D

DECISION OF ADMINISTRATIVE LAW JUDGE KENNEDY

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Docket No. HOPE 75-679

Charles T. Sink

v.

Mining Enforcement and Safety Administration (MESA)

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Hearings Division

CHARLES T. SINK, Application for Review

Applicant

v. Docket No. HOPE 75-679

MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA),

Respondent

Charles T. Sink Mine No. 1

DECISION

Appearances: William W. Talbott, Esq., Webster Springs, West Virginia, for Applicant.
John M. Allen, Esq., Office of the Solicitor, Department of the Interior, for Respondent MESA.

Before: Administrative Law Judge Kennedy

Statement of Proceedings

By order entered December 5, 1974, the United States District Court for the Southern District of West Virginia enjoined the Secretary of the Interior from enforcing a Notice of Violation and four (4) Withdrawal Orders issued under

section 104(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sec. 814(c), until the operator is afforded an opportunity to challenge their validity under section 105(a) of the Act, 30 U.S.C. Sec. 815(a)[1] *Charles T. Sink* v. *Morton,* Civil Action No. 74-495-CH. The Court citing *Lucas* v. *Morton,* 358 F. Supp. 900 (W.D. Pa. 1973) held the operator would suffer irreparable harm if the closure orders were enforced prior to a hearing and that no countervailing interests of safety were involved.

Thereafter the parties filed a joint motion for summary decision and waiver of an evidentiary hearing together with a stipulation of the issues and evidentiary facts necessary to such a decision.

Since the stipulation and motion show there is no genuine issue of material fact and that the issues of law presented[2] may be decided on the basis of the pleadings, the stipulation, and other admissions contained in the record of the prehearing conference, it is appropriate to treat the matter as submitted for summary disposition in accordance with 43 CFR 4.588 and 4.590.

Accordingly, the Administrative Court makes the following:

FINDINGS AND CONSLUSIONS

I.

Applicant Charles T. Sink, is the owner and operator of a small, underground coal mine (a drift mine) in Boggs,

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1. While it does not challenge the order of remand, the Government has appealed that portion of the Court's order that enjoined enforcement of the notice and orders on the ground the *(sic)* lacked jurisdiction to issue the injunction in question.

2. Issues not raised or disposed of are reserved for subsequent consideration if that becomes necessary.

Webster County, West Virginia. Prior to September 1973, the property, known as the Sink Coal Company, Mine No. 1, (the Sink Mine) was operated by the Interstate Development Company under a lease from Mr. Sink. After Interstate abandoned the mine, Mr. Sink cancelled the lease and in September 1973 reopened the mine and commenced mining operations in partnership with his son, Bill Sink. Applicant is solely dependent upon his mining operations as his means of livelihood. He has seven dependents, including two children attending college.

Both Mr. Sink and his son are "miners" within the meaning of section 3(g) of the Federal Coal Mine Health and Safety Act of 1969, (the Act).[3] Mr. Charles Sink is an owner-operator within the meaning of section 3(d) of the Act.[4] At the time of issuance of the notice and orders in question they were the only underground miners working the Sink Mine.

On November 5, 1974, a federal coal mine inspector conducted an inspection of Mr. Sink's mine. As a result of that inspection, the inspector issued one notice of violation and four (4) orders of withdrawal pursuant to section 104(c) of the Act. Shortly thereafter Mr. Sink brought suit to enjoin enforcement of the notice and orders in the United States District Court for the Southern District of West Virginia on the ground that the Act does not apply to small, owner-operated mines, or in the alternative, the Act is unconstitutionally vague. In its Memorandum Order entered December 5, 1974, the Court found that the operator was required to exhaust its administrative remedy with respect to the substantive issues raised, including the question whether the products of the mine enter into or affect interstate commerce, but enjoined enforcement of the notice and orders pending exhaustion of the administrative remedy provided under section 105(a) of the Act.

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3. A miner is defined as "any individual working in a coal mine."

4. An operator is defined as "any owner * * * who operates, controls, or supervises a coal mine."

II.

With respect to the operative facts the stipulated record shows:

1. The entire production of the Sink Mine from the time Mr. Sink reopened it in September 1973 until November 1974, when the notice and orders were issued was 2,947 tons. Peak production never exceeded 30 tons a day, average production was less than 10 tons per day.

2. During the period of September 1973 to November 4, 1974, seventy-five percent (75%) or approximately 2,300 tons of the coal produced from the Sink Mine was sold at the mine to purchasers who hauled it away themselves for local consumption.

3. During 1974, Mr. Sink contracted with an independent trucker to haul some of the coal to a site in Cowen, West Virginia, leased from Cowen Coal's Inc. This coal was stockpiled there for sale by Mr. Sink.

4. Between June 1 and November 4, 1974, the operator sold 738 tons or approximately twenty-five percent (25%) of the coal produced in the Sink Mine to a coal broker, Courtney F. Foos Coal Co., Inc., of Norfolk, Virginia. All of this coal was loaded into railroad cars from coal stockpiled at Cowen Coal's in Cowen, West Virginia, and shipped to various customers of the broker in the State of Pennsylvania. The coal sold to Mr. Foos and delivered to customers located in the state of Pennsylvania was priced at between $50 and $60 per ton making the total value of the amount shipped approximately $40,000.

5. The operator purchased all the supplies used in the mine in the State of West Virginia, from dealers and distributors who procured these supplies from sources outside the State of West Virginia. The value of the explosives and fuel procured from these sources was approximately $700 during the year in question.

6. All the equipment used in the mine was used equipment purchased from individuals located in West Virginia. It was valued at approximately $4,500. The Joy Loading Machine, the S&S battery-operated tractor, and the electric motor used to drive the ventilating fan were all manufactured by sources outside the State of West Virginia.

7. Three of the closure orders issued on November 5, 1974, related to the use of nonpermissible electric face equipment inby the last open crosscut (Sections 305(a)(1), (2) of the Act, 30 CFR 75.500, 501) and the alleged failure to use methane monitors on loading and cutting machines in the Sink Mine (Section 303(1) of the Act, 30 CFR 75.313).

8. The notice and the first order relate to the operator's failure to furnish plans preliminary to reopening of the mine in accordance with 30 CFR 75.1721 and to establish a respirable dust program in accordance with 30 CFR 70.201.

III.

It is further found that the following facts, as reflected in the legislative history of the Federal Coal Mine Health and Safety Act of 1969, are relevant and material to a determination of Congressional intent:

1. In signing the Federal Coal Mine Safety Act of 1952 (Pub. L. No. 82-552, 66 Stat. 692), President Truman criticized the small mine exemption (fewer than 15 miners), and in 1966, through the enactment of the Federal Coal Mine Safety Act Amendments of 1965, Pub. L. No. 89-376, 80 Stat. 84, the small mine exemption was eliminated. During consideration of the bills that became the Federal Coal Mine Health and Safety Act of 1969, creation of an exemption for small, nongassy mines was carefully considered and rejected. As finally passed, the requirement that all mines, regardless of size, must use permissible electric face equipment was adopted. *Legislative History, Federal Coal Mine Health and Safety Act,* House Comm. on Education and Labor, 91st Cong., 2d Sess., at 5-6, 27-35, (S. Rep. No. 91-411) (Comm. Print, 1970)

(hereinafter *Leg. Hist.*). See also, *Reliable Coal Company* v. *Morton,* 478 F.2d 257 (4th Cir. 1972).

2. In 1969, small mine operators accounted for approximately eight percent (8%) of the nation's coal production and employed between 15,000 and 20,000 miners. *Leg. Hist., supra,* at 28.

Based upon a consideration of the Act and its legislative history, I conclude that Congress intended to regulate the health and safety practices in all coal mines, including small, owner-operated coal mines where (1) the coal produced by such mines enters the stream of commerce between the states, (2) the marketing of such coal involves the use of interstate traffic or communications, or (3) the operations or marketing of coal by such mines when viewed as a class substantially affects the effective exercise of the constitutional power of Congress to regulate interstate trade and commerce in coal.

ISSUES PRESENTED

The following issues are presented:

1. Whether Congress intended to subject small, owner-operated coal mines, such as the Sink Mine, to the regulatory requirements of the Federal Coal Mine Health and Safety Act of 1969.

2. Whether the coal produced at the Sink Mine enters the flow of interstate commerce.

3. Whether the operations and marketing of coal by the Sink Mine when considered together with the operations and marketing activities of all small coal mines substantially affects the constitutional power of Congress to regulate interstate trade and commerce in coal.

4. Whether application of the Act to the Sink Mine will result in depriving the operator of his property without due process of law.

5. Whether the questions of coverage and constitutional validity of the Act are within the authority and jurisdiction of the Administrative Court and presiding Judge.

APPLICABLE STATUTES

Under Section 2 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sec. 801, Congress has declared the following:

> (a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner;
>
> (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;
>
> * * * * *
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce * * *.

In sections 3(b) and 4 "commerce" is defined as follows:

Section 3(b):

> "Commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof.

Section 4:

> Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

DECISION

I

The operator's primary contention is bottomed on the claim that the history of federal coal mine health and safety legislation shows that depite the breadth of the declaration of purpose set forth in section 2 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sec. 801, Congress did not intend to protect applicant and his son from the occupational hazards incident to their work as underground miners, because they are individual entrepreneurs responsible only for themselves and to themselves for the risks they assume in working their own mine. Thus as the operator reads the Act, it was designed to protect only miners employed by others to mine coal, and not to owner-operators engaged in mining their own coal.

In support of this position, the operator relies heavily on the decision in *Bloom* v. *Morton*, 373 F. Supp. 797 (W.D. Pa. 1973), where the Court held that "it was not a part of the legislative intent of Congress to subjugate a one-man, owner-operated coal mine to the requirements of the Act" because such activity is not "within the reach of Congress to regulate" and because the Court could not perceive how "the Act which seeks to minimize a predisposition for profits over safety would protect men" responsible only to themselves for safety precautions necessary to insure their own livelihood. 373 F. Supp. at 798.

The case thus presents a classic confrontation between an individual's claims of freedom of action and the State's assertion of power to regulate and control his activities. Much as I can sympathize with the operator's and the District Court's ringing declarations of rugged individualism and independence of governmental interference, I must on the basis of my reading of the Act, the Congressional intent, and the Constitution, totally disagree. While many in both large and small business equate governmental intervention in private affairs for the public benefit with a degradation of personal liberty, it is not my function to mediate or resolve the clash in political philosophy. My function is to determine (1) whether Congress had the power to regulate the applicant's activities, and (2) whether Congress intended to regulate those activities.

A.

As my findings indicate, the Act, and it predecessors, show that commencing with the Federal Coal Mine Safety Act Amendments of 1965 (Pub. L. 89-376), Congress made a conscious decision to exercise to the utmost its plenary power over interstate commerce to control and regulate the health and safety practices encountered in the environment of the nation's underground coal mines, whether large or small, and to protect all individuals, regardless of their employment status, from the occupational hazards present in such environments. This purpose finds its most succinct expression in the Senate Report that accompanied the bill which became Public Law 89-376:

> "The purpose of this bill is to extend the mandatory safety provisions of the Federal Coal Mine Safety Act to mines regularly employing less than 15 men underground, which are now exempt from such requirements, and to strengthen certain other provisions of the act in order to increase the protection of lives and property in all underground coal mines, to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966).

This intent and purpose carried forward into the present Act as reflected in its declaration of purposes and the specific refusal of Congress to exempt small nongassy mines, such as the mine in question (Finding III) from the coverage of the Act. Thus, the declaration of legislative purpose clearly sets forth the intention of Congress to protect not only the national economy from the disruption of production occasioned by serious mine accidents and disasters, but also to protect "operators and miners" and their families from "loss of income" and their livelihood as the result of individual mine accidents and occupationally caused diseases. Section 2(a), (b), (f).

To this end, Congress has unqualifiedly required that "*each operator of a coal mine* and every miner in such mine *comply with*" *the mandatory safety standards.* Section 2(g)(2). (Emphasis supplied.) As Senator Williams, floor manager and Chairman of Senate Committee, stated:

> "S. 2917 is a major comprehensive measure which offers our Nation's coal miners the promise of a lifetime of productive work free from the hazards that have depleted this work force. It offers the families of our coal miners the hope of relief from the daily fears that permeate their lives.
>
> "The bill * * * provides the means to improve the health and safety conditions and practices at all underground coal mines * * *." *Leg. Hist., supra,* at 115.

This intertwining of the socio-economic purpose is further underscored by the all-embracing definition of the class of activities covered. Thus, in section 4 the jurisdictional reach is stated as follows:

> "*Each coal mine,* the products of which enter commerce, or the operations or products of which affect commerce, *and each operator of such mine,* and every miner in such mine *shall be subject to the provisions of this Act.*" (Emphasis supplied.)

As the Conference Reports, H. Rep. No. 761, 91st Cong., 1st Sess. (1969), noted:

> "Under this provision, as in the case of both the Senate bill and the House amendment, the coal mine, the operator of the mine, and every miner therein is subject to the provisions of the Act." *Leg. Hist. supra,* at 1026. See also, S. Rep. No. 411, 91st Cong., 1st Sess., (1969); *Leg. Hist., Supra,* at 44.

B.

Applicant also claims that because certain of the provisions of the Act are inapplicable to small owner-operated mines, Congress did not intend any of its provisions to apply to such mines. An interpretation that leads to an absurd result is, of course, to be avoided, but not every absurd interpretation is to be adopted. I find applicant's contention seriously flawed from the standpoint of both logic and the law.

First, section 510 of the Act provides that if any provision or the application thereof is held invalid, the effectiveness of the remainder shall remain unimpaired. Second, applicant has cited no persuasive reason for not applying the standards cited in the notice and orders to his mine or to any reason for concluding that Congress did not intend to protect men such as the applicant and his son from the occupational hazards incident to their work as underground miners. To the contrary, as I have found, Congress specifically addressed the

question of exempting small, nongassy mines from the requirements for permissible electric face equipment and rejected the proposal.

Third, the fact that the applicant and his son may not qualify for black lung benefits under Title IV of the Act is no reason to permit them to subject themselves to the dangers of this deadly occupational disease where there are readily available inexpensive techniques, methods and technology for detecting and suppressing the respirable dust levels present in their working environment. Fourth, there is nothing in the Act or its legislative history to support the view that Congress did not intend Title II, and more particularly sections 201(b) and 202 to apply to small owner-operated mines, simply because the miners working in such mines may not qualify for black lung benefits payable by an operator under Part C of Title IV of the Act.

Finally, I find the Act replete with provisions for its flexible application and with both administrative and judicial remedies for any action claimed to be discriminatory, arbitrary, or capricious. Compare, *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 49 (1938). Thus, sections 5, 104(h), 105, 106, 202(b), 301(c) and 305(a)(2), (6)-(10), permit an operator to challenge the application of any standard to his mine and to seek, upon an appropriate showing, noncompliance permits, modifications and waivers of the standards.

C.

For these reasons, I reject the view that Congress did not intend to regulate the health and safety practices of operators of small, owner-operated coal mines, the products of which enter commerce or the operations or products of which affect commerce.

Furthermore, I find no basis either in the Constitution or elsewhere for concluding that Congress was without power to regulate working conditions in the Sink Mine. As noted, Congress was concerned only with the purely economic impact of unsafe and unhealthy working conditions but also with their

social and humanitarian impact. Regulation or policing of the channels of interstate commerce to achieve either or both ends is entirely legitimate. [5]

As a leading commentator on the Constitution has noted:

> "The power 'to regulate' is the power to govern, that is, the power to restrain, to prohibit, to protect, to encourage, to promote, in the furtherance of any public purpose whatsoever, *provided,* the constitutional rights of persons be not transgressed." Corwin, *The Constitution, What It Means Today,* at 40, (Princeton Univ. Press, 1973 Ed.).

Furthermore, whenever circumstances make it "necessary and proper" for Congress to regulate wholly local activities in order to regulate, control, police and promote effectively trade or commerce among the States, it may do so. As the Supreme Court held in *Atlanta Motel* v. *U.S.*, 379 U.S. 241, 258 (1964):

> "* * * the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."

Justice Black's concurring opinion pointed out that

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5. Time after time the Supreme Court has upheld the power of Congress under the commerce, the necessary and proper, and the equal protection clauses of the Constitution to promote, protect and advance ends not entirely commercial. *Atlanta Motel* v. *United States,* 379 U.S. 276-77, fn. 11 (1964) Black, J. concurring); *Id.* at 257, 280-81.

> "* * * it has long been held that the Necessary and Proper Clause, Art. I, Sec. 8, cl. 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States. Thus in the *Shreveport Case* * * * 234 U.S. 342, 353-354, this Court recognized that Congress could not fully carry out its responsibility to protect interstate commerce were its constitutional power to regulate that commerce to be strictly limited to prescribing the rules for controlling things actually moving in such commerce or the contracts, transactions, and other activities immediately concerning them * * * the *Shreveport Case* sustained the power of Congress under the Commerce Clause and the Necessary and Proper Clause to control purely intrastate rates, even though reasonable, where the effect of such rates was found to impose a discrimination injurious to interstate commerce * * * and since the *Shreveport* case this court has steadfastly followed, and indeed emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate.
>
> "* * * in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to

> the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow * * *." *Atlanta Motel* v. *United States, supra,* at 271-72, 275.

It is clear that Congress may by appropriate legislation regulate purely local or intrastate activities where when added to many others of a similar nature the cumulative effect on its power to regulate interstate commerce is substantial. *Wickard* v. *Filburn,* 317 U.S. 111, 127-28 (1942). It is also well settled that Congress is free, following its own conception of public policy, to exclude from wholly intrastate commerce commodities produced under working conditions it conceives to be injurious to the public health, safety morals or welfare where the production or marketing of such commodities has a substantial socio-economic impact on interstate commerce or the exercise of Congressional power over it. *United States* v. *Darby,* 312 U.S. 100, 114, 119-120 (1941); *Labor Board* v. *Fainblatt,* 306 U.S. 601, 606, 608-609 (1939). Consequently, even if the operation of the Sink Mine is deemed a purely local activity, it is subject to regulation under the provisions of the Act as one of a class of activities Congress has determined to be essential to the effective exercise of its power to regulate working conditions in the nation's coal mines and commerce in coal. *United States* v. *Darby, supra,* at 120-21; *Shreveport Case, surpa; Katzenbach* v. *McClung,* 379 U.S. 294, 300-301 (1964).

This determination Congress has made and set forth both in the declaration of policy found in section 2(a), (b), (f), and (g) of the Act, as well as in the reports of the Congressional Committees that produced it. More specifically, as I read section 2(f) and (g) Congress has found that the production of coal under conditions that do not comply with the mandatory safety standards "unduly impedes and burdens commerce." For this reason, I find applicant's reliance on *Gulf Oil Corp.* v.*Copp Paving Co.,* _U.S._, 95 S. Ct. 392

(1974) misplaced. For here Congress has not left it to the Secretary of the judiciary to determine whether "apparently local acts in fact have adverse consequences on interstate markets and the interstate flow" of coal. 95 S. Ct. at 402. Under sections 2, 3(b) and 4 of the Act and in the factual findings contained in the legislative history, Congress has determined that the production of all coal under conditions detrimental to the health and safety of miners adversely affects its power to regulate effectively the flow of coal in interstate commerce.

As Mr. Justice Stone speaking for a unanimous Court said in *United States* v. *Darby, supra:*

> "* * * Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. *And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Applicance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power* * * *.
>
> "Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced

for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. * * * A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled * * *.

"The means adopted by [section 104(c)] for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power * * *. *Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer.* It is recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. * * * The legislation aimed at a whole embraces all its parts." 312 U.S. *supra* at 120-21, 123. (Emphasis supplied.)

My reading of the thrust of *United States* v. *Darby*, *supra*, is confirmed by the most recent decisions of the Court. Thus, in *Maryland* v. *Wirtz*, 392 U.S. 183, 192 (1968) the Court said:

"However, while Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. 312 U.S. 120-121. The only question for the courts is then whether the class is "within the reach of the federal power." *Ibid. The contention that in Commerce Clause cases the courts have power to exercise as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. Wickard* v. *Filburn*, 317 U.S. 111, 127-128; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 648; *Katzenbach* v. *McClung, supra*, at 301." (Emphasis added.)

And in *Perez* v. *United States*, 402 U.S. 146, 152-154 (1971), the Court repeated that:

"In *United States* v. *Darby*, 312 U.S. 100, * * * *a class of activities* was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. * * *

"It was the 'class of activities' test which we employed in *Atlanta Motel* v. *United States*, 379 U.S. 241, to sustain an Act of Congress requiring hotel or motel accomodations for Negro guests. * * *

"In a companion case, *Katzenbach* v. *McClung*, 379 U.S. 294, we ruled on the constitutionality of the restaurant

provision of the same Civil Rights Act * * *.

"In emphasis of our position that it was the *class of activities* regulated that was the measure, we acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce. *Id.* at 301.

"Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland* v. *Wirtz*, 392 U.S. 183, 193."

Since I conclude there was a rational connection between the class of activities Congress sought to regulate, namely working conditions in the nation's coal mines including small, owner-operated mines, and the power of Congress effectively to regulate the production of coal for commerce, under working conditions inimical to the health and safety of miners, I find regulation of the activity in *all* of the nation's coal mines was within the reach of Congress under the Commerce Clause; that Congress itself has determined that regulation of all activity is necessary; that this determination is amply supported; and therefore there need be no "independent inquiry regarding the effect on commerce of" the operations of the Sink Mine.[6] *Katzenbach* v. *McClung, supra,* at 303-304;

6. As Mr. Justice Clark noted:
"Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. at 303-304. As Noted, in this case the formal declaration of

Maryland v. *Wirtz, supra,* at 190; *Perez* v. *United States, supra.* The essence of the affectation doctrine as distilled from the holdings of the Supreme Court is that where an entity is determined by Congress to fall within a rationally defined class that affects the exercise of the commerce power, it will not thereafter be excised no matter how trivial or insignificant its actual impact.

II

While I believe my finding that Congress intended to regulate and control conditions relating to occupational health and safety in all coal mines is dispositive, I will deal also with the alternative grounds asserted with respect to applicant's claimed exemption from the Act.

The operator contends that even if its status as an owner-operator does not remove it from the coverage of the Act, its activities do, because the products of the mine are sold almost exclusively in intrastate commerce. This is not factually correct.

As the findings show, approximately 25 percent of the coal produced during the period in question was sold to interstate customers. In addition, the three transactions shown involved use of a broker located in Norfolk, Virginia. It seems obvious that use of this broker involved orders and billings that crossed state lines and that passed between West Virginia, Virginia and the State of Pennsylvania. Furthermore, the undisputed facts show that the coal was shipped from Cowen, West Virginia, where it had been stockpiled for sale by the operator, to various customers located in the State of Pennsylvania.

fn 6. (con't.)
purpose, the all embracing definition of commerce adopted and the legislative history of federal coal mine health and safety legislation establishes the factual predicate and necessary formal determination with respect to the coverage of the Act. Compare, *Katzenbach* v. *McClung, supra,* at 304; *Maryland* v. *Wirtz, supra,* at 190, fn 13.

The fact that the coal was sold in West Virginia and that title may have passed in West Virginia is irrelevant. For where coal is sold in one state for transportation and delivery in another state the sale is as much a part of the interstate transaction as the shipment and delivery. See, *Currin* v. *Wallace,* 306 U.S. 1, 10 (1938). In determining whether commerce is interstate or intrastate one must look to the totality and essential character of the transaction. In *Pennsylvania Railroad* v. *Clark,* 238 U.S. 456 (1915), the Supreme Court held that even where 95 to 98 percent of the production of a mine was sold f.o.b. cars at the mine for shipment to both intrastate and interstate destinations, the transactions were subject to regulation under the Commerce Clause. As the Court noted,

> "In the present case, to repeat, it appears that for the purpose of filling contracts with purchasers in other States, coal is delivered f.o.b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the Commission which Congress has established." *Id.* at 468.

Accordingly, it is found that a preponderance of the reliable, probative, and substantial evidence establishes that approximately 25 percent of the coal produced by the Sink Mine regularly entered the flow of interstate commerce during the period in question and therefore the mine is subject to the "in

commerce" reach of the Federal Coal Mine Health and Safety Act of 1969.

III.

Having determined that the Sink Mine is subject to the "in commerce" reach of the Act, it is unnecessary to determine whether in the absence of such a showing the operations or production of the mine standing alone substantially affect interstate commerce. As I have held:

> "Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States* v. *Darby,* 312 U.S. 100, 115, *may* be exercised in individual cases without showing any specific effect upon interstate commerce, *United States* v. *Walsh,* 331 U.S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard* v. *Filburn, supra,* * * *Mandeville Island Farm, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948).

Moreover, as my findings show, the number of miners engaged in mining coal in the small mines of the nation is quantitatively substantial as is the production of such mines. I also think it fair to infer Congress knew that the number of miners engaged in mining coal in the small mines of West Virginia is quantitatively substantial as is their coal production, and that the socio-economic impact of their collective activity has a substantial effect on the power of Congress to effectively regulate commerce in coal through regulation of occupational safety and health practices in all coal mines.

It is well settled, that "If it is interstate commerce that feels the punch, it does not matter how local the operation

which applies the squeeze." *United States* v. *Women's Sportswear Manufacturing Association,* 336 U.S. 460, 464 (1949). Consistent with this, and the broad and comprehensive purpose of the remedial legislation before me, I conclude therefore that proper application of the affecting commerce doctrine as enunciated in *United States* v. *Darby,* 312 U.S. 100 (1940); *Wickard* v. *Filbur,* 317 U.S. 111 (1942); *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), (Discussed, *supra* Part I-C) dictate a finding that while the operations and production of the Sink Mine may be insignificant or trivial, its operations and production must be taken together with the operations and production of all small coal mines similarly situated and that when so considered the socio-economic impact of such operations has a quantitatively substantial impact on interstate commerce. I further find that the socio-economic impact whether considered local or national and whether intrastate or interstate would have a sufficiently adverse and disruptive effect on the exercise of the constitutional power of Congress to regulate the interstate commerce involved in the production of coal as to warrant the regulation of such activity. See, *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119-120, 121 (1942); *Mandeville Island Farms Inc.* v. *American Crystal Sugar Company, supra,* at 232-234.

Accordingly, I would in the alternative sustain the power of Congress to regulate the occupational health and safety practices in the Sink Mine on the ground that the production of coal and the operation of all small, owner-operated coal mines considered as a class substantially affect the commerce power. Finally, I conclude that for reasons previously stated it was the intent of Congress to regulate the operations of all coal mines.

IV.

The Act does not deprive applicant of liberty or property without due process of law under the Fifth Amendment or

constitute a taking of property without just compensation. [7] The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions then are (1) whether Congress had a rational basis for findng that regulation of the occupational safety and health practices in all of the nation's coal mines necessarily affected its power to regulate commerce, and (2) if it had such a basis, whether the means it selected to eliminate the evils perceived are reasonable and appropriate. If they are, and I have previously found that they are, applicant has no "constitutional right" to be free from government regulation. *Atlanta Motel* v. *United States, supra,* at 258-259; *Lucas* v. *Morton,* 358 F. Supp. 900 (W.D. Pa. 1973); *Old Ben Coal Corporation,* Docket Nos. VINC 73-96, VINC 73-214-P, Decision of November 14, 1974, at 41-46, appeal pending

7. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 676-680 (1974), the Supreme Court held that it is not necessarily a denial of due process for a regulatory statute to provide for postponement of an opportunity for a hearing into the legality of an enforcement action even where private property is seized. Thus, the Court held that where (1) the action was necessary to secure an important governmental or general public interest such as preventing alleged continued illicit use of private property, (2) there was a special need for very prompt action, such as protecting the health and safety of miners, and (3) the person initiating the action was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance the requirements of due process did not mandate a preseizure notice and hearing. The four narrowly drawn prerequisites to action under section 104(c) clearly meet this test. Whether the action actually taken was, under the circumstances, justified is not presently before me. Furthermore, section 105(d) of the Act provides that pending a hearing on the merits in a review proceeding a closure *order* may be stayed if upon an application and hearing for temporary relief the operator shows there is a likelihood he will prevail on the merits and that such relief will not adversely affect the health and safety of miners. *Lucas* v. *Morton,* 358 F. Supp. 900, 904 (W.D. Pa. 1973). Compare, *Gateway Coal Company,* 1IBMA 82 (1972); *Reliable Coal Corporation,* 2IBMA 97 (1972).

IBMA Docket No. 75-17; *Clinchfield Coal Company*, Docket No. HOPE 72-25, Decision of January 14, 1974, at 11-13.

I also find no merit in the claim that the mandatory safety standards as applied in this case or on their face are unconstitutionally vague. [8] The cases are to the contrary. See, *Atlanta Motel* v. *United States, supra,* at 261; *United States* v. *Consolidation Coal Co.*, 504 F.2d 1330, 1332 (6th Cir. 1974); *Parker* v. *Levy*, 419 U.S. 733 (1974).

V.

Finally, I reject as unsound the Solicitor's suggestion that the Administrative Court is without authority or jurisdiction to entertain the applicant's challenge to the coverage of the Act or power of Congress under the Commerce and Due Process Clauses of the constitution. [9] In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Supreme Court unanimously held that where a challenge is made to the coverage or validity of an Act of Congress "the long settled rule of judicial administration [is] that no one is

8. This is not to say that the nonstatutory standard (30 CFR 75.1721) on which the section 104(c) notice was based may not be subject to challenge as *ultra vires*. See, *United States* v. *Finley*, 493 F.2d 285 (6th Cir. 1974), *cert. denied*, 43 L.W. 3359 (1974). And, of course, if the notice is declared invalid the subsequent orders may be invalid. See, *Old Ben Coal Corporation*, Docket Nos. VINC 74-188 *et al.*, Decision of March 6, 1975, appeal pending, at 8-9. Since the validity of the notice and orders may not be determined in a penalty proceeding, and do not affect the operator's liability under section 109(a)(1) and (3), they should if necessary be determined in this review proceeding. See, *Jewell Ridge Coal Corporation*, 3 IBMA 376 (1974).

9. Since the government vigorously argued that the District Court was without jurisdiction to consider these questions and prevailed, I now find it somewhat incongruous, to say the least, to find the government arguing that in effect there is no administrative remedy.

entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." 303 U.S. at 50-51. This rule is codified in section 106 of the Act which provides the courts may not consider a challenge to the validity of any order or decision of the Secretary under the Act unless or until the operator has exhausted the administrative remedies provided under § 105 of the Act. *Lucas* v. *Morton, supra,* at 905. Indeed, the District Court in this very case found that despite the constitutional challenge "The requirement that plaintiff exhaust his administrative remedies under the Act is entirely reasonable and in accord with accepted principles of administrative law" citing *McCaulay* v. *Waterman,* 327 U.S. 540, 543-544 (1946) and *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 772-773 (1947). See also *McKart* v. *United States,* 395 U.S. 185, 192-195 (1969).

In those cases the Supreme Court held that questions of both coverage and constitutionality of legislation are subject to the exhaustion doctrine. Furthermore, in *W.E.B. DuBois Clubs of America* v. *Clark,* 389 U.S. 309 (1967) the Court held that a claim that the Subversive Activities Control Act violated plaintiff's rights under the First Amendment should first be decided by the Subversive Activities Control Board, an administrative agency, because "important and difficult constitutional issues [should not] be decided devoid of factual context and before it was clear that appellants were covered by the Act." 389 U.S. at 312. The Court emphasized that, as is true here, provision was made for a full hearing, with review by a court of appeals.

Since the intertwined questions of coverage and constitutionality were both raised before the District Court which remanded them for administrative determination at the urging of the government, I decline the suggestion that the Administrative Court is without authority to determine any of the questions presented. In addition, and for the reasons set forth in my decision in *Old Ben Coal Corporation,* Docket Nos. VINC 73-96, 73-214-P, *supra,* I find that, notwithstanding the decision of the Board in *Buffalo Mining*

Company, 2IBMA 226, 241 (1973),section 106(a) (of the Act, section 8(b) of the Administrative Procedure Act, 5 U.S.C. Sec. 557(c), and controlling decisions of the Supreme Court require and authorize the Hearings Division and the undersigned Administrative Law Judge to determine initially the questions of coverage and constitutional validity of the Act raised in this review proceeding.[10]

As Professor Jaffee has pointed out, *Public Utilities Comm.* v. *United States,* 355 U.S. 534 (1958), cited by the Solicitor and the Board for the proposition that this Administrative Court is without power to decide constitutional issues, involved a question more of state-federal relationships and the supremacy doctrine than administrative law and the exhaustion doctrine. Jaffe, *Judicial Control of Administrative Action,* at 438. Compare, *Public Utilities Comm.* v. *United Fuel Gas Co.,* 317 U.S. 456, 469 (1943) with *Whitney Natl. Bk.* v. *Bank of New Orleans,* 379 U.S. 411, 420-421, 422 (1965).

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10. As the Court noted in the *Hirsch* case, *supra:*

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision." 331 U.S., *supra,* at 767-768.

CONCLUSIONS OF LAW

1. Under section 105(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sec. 815(a) and 43 CFR 4.530 *et seq.*, the Office of Hearings and Appeals and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter of this proceedings.

2. Small, owner-operated coal mines are covered by and subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sec. 801 *et seq.*

3. Coal produced by the Sink Mine is regularly sold through interstate means and enters the stream or flow of interstate commerce within the meaning of sections 3(b) and 4 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Secs. 802(b) and 803.

4. Under the Federal Coal Mine Health and Safety Act of 1969, Congress has determined for itself that unsafe and unhealthy working conditions in the nation's coal mines unduly impedes and burdens commerce. Consequently, while the operations and production of the Sink Mine are insignificant when compared to total coal production, Congress has determined that the class of activities of which the mine is a representative and integral part, namely small, owner-operated mines, when taken together substantially affects the effective execution of its power to regulate trade, traffic and commerce in coal.

5. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by coal produced under substandard working conditions, has made no distinction as to the volume or amount of shipments in the commerce or production for commerce by any particular producer. Thus, even if the operator's activity is deemed local and not a part of interstate commerce, it may still, whatever its nature be reached and regulated under the Commerce Clause, since it is part of a class that exerts a substantial effect on interstate commerce. Where a class of activities within the reach of the commerce power is regulated, neither the

Secretary nor the courts have power "to excise, as trivial, individual instances" of the class.

ORDER

WHEREFORE, the undersigned Administrative Law Judge having made his findings and conclusions, and having set forth the reasons and basis therefor, on all material issues of fact, law or discretion presented on the record:

IT IS DECLARED, that the Secretary of the Interior, acting through MESA, has the power and authority under the Federal Coal Mine Health and Safety Act of 1969, to regulate health and safety practices in the Sink Mine, and

IT IS ORDERED THEREFORE, that the Application for Review be, and hereby is, DENIED, without prejudice to the operator's right to challenge the validity of the section 104(c) notice and orders on other grounds in this or any subsequent penalty proceeding.

/s/ Joseph B. Kennedy
Joseph B. Kenndy
Administrative Law Judge

Date Issued: May 19, 1975

APPENDIX E

MEMORANDUM AND ORDER

MORTON v. PAPPAL

CIVIL ACTION No. 75-95 [W.D.Pa., 1975]

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary
of the Interior, United
States Department of Labor,

Plaintiff,

v. Civil Action No. 75-95

CHARLES PAPPAL, Trading and
Doing Business as F. P. and
K Coal Company, Moros Mine,

Defendant.

MEMORANDUM AND ORDER

BARRON F. McCUNE, District Judge
May 5, 1975

We are asked to issue a Preliminary Injunction closing a coal mine under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.*

Charles Pappal, the defendant, as a sole proprietor, operates his own coal mine in Indiana County, Pennsylvania. He employs no one except his son. He hauls the coal which he mines to the mouth of the shaft with one pony. In a year's time, Mr. Pappal produces about 1700 tons of coal which is sold to the people who reside around the mine for use in heating their houses. He charges $20.00 per ton for the coal. None of the coal leaves Pennsylvania, or for that matter, Indiana County. The people who buy the coal come to the mine and pick it up. Pappal does not deliver coal. He owns

one truck which he uses to commute to the mine and back. He does not really compete with any other mine. He supplies the only good house coal in the vicinity but people could buy coal from coal strippers in the vicinity if they wanted to do so.

Everything Pappal uses is obtained in Pennsylvania with one possible exception mentioned hereinafter.

He uses some explosives but they are purchased in Stroudsburg, Pennsylvania, and they are manufactured in Pennsylvania as well. He uses a rectifier but it was manufactured in Homer City, Pennsylvania. He uses a couple of water pumps, the motors for which were bought in Pennsylvania. He also uses a cutting machine so old that its predigree had to be traced. It was sold originally on June 6, 1942, by the Sullivan Mining Machine Company (now apparently not in existence, but formerly of Connecticut) to the Redeye Coal Company in West Virginia. The government mine inspectors obtained all the information they could obtain about the old mining machine apparently in an attempt to find something which Pappal had brought into Pennsylvania. Pappal told them he bought it as junk from Redeye so presumably at some time it was brought into Pennsylvania, probably back in 1961 when Pappal bought the mine.

All of the above testimony came from government witnesses because Pappal did not testify. He is not represented and appeared at the hearing alone. He is a quiet, somewhat retiring man, who appeared to be quite composed. The mine inspectors described him as a gentleman and he has cooperated with the government inspectors in all of their inspections.

The government seeks the injunction closing the mine because Pappal is in obvious violation of the Act. Specifically, the old mining machine does not meet requirements and there is no way to modify it short of an expenditure of from $5000.00 to $10,000.00. The main defect in the old machine is that some kind of cover must be devised for parts of it because if coal dust accumulates in it a fire might result.

Originally, the department issued three orders to Pappal, one of which he has complied with and one of which, at the time hearing, he was in the act of complying with. He was ordered to run a ground wire to the mining machine and he did this. He was ordered to tape certain bare spots in the wiring which he had substantially completed at the time of hearing but he has refused to give up the machine or spend the money required to modify it.

(We had, a good while previous to the hearing, attempted to settle this litigation and the two conditions mentioned had presented no particular problem).

There appears to be no question that the old machine fails to meet the present day standards anymore than a 1942 truck would meet present day emission standards.

The issue in the case is whether the Act applies to Pappal. He takes the position that Congress has no jurisdiction of his mine because the products of it do not enter commerce nor do the operations of it or the products of it do not enter commerce nor do the operations of it or the products of it affect commerce. He made a good argument at the close of the testimony.

The Act (30 U.S.C. §803) provides that "each coal mine, the products of which enter commerce, or the operations or products of which affect commerce and each operator of such mine and every miner in such mine shall be subject to the provisions of this chapter."

In the section (§802) containing definitions, "commerce" is defined. The act states that "commerce means trade, traffic, commerce, transportation or communication among the several states or between a place in a state and any place outside thereof, or within the District of Columbia or a possession of the United States or between points in the same state but through a point outside thereof."

(The question, of course, is whether Pappal's operation has any affect on interstate commerce. The government has furnished a thorough brief on the subject arguing that we have jurisdiction but we reject the government's argument. Pappal's affect on interstate commerce would be so slight as to defy measurement.)

There is little point in reviewing this enormous field of the law. We think the law has been established in this District, in any event, by the opinion of the Honorable Wallace S. Gourley in *Rogers C. B. Morton* v. *Ralph Bloom, Jr., t/a Ralph Bloom Jr. Coal Company,* 373 F. Supp. 797 (1973). We agree with what was said there.

The petition for the Preliminary Injunction will be denied and the complaint is dismissed.

The within memorandum contains the findings of fact and conclusions of law required by Rule 52.

It is so ordered.

/s/ Barron F. McCune

UNITED STATES DISTRICT JUDGE

APPENDIX F

STIPULATION OF FACTS

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Docket No. HOPE 75-679

IN THE MATTER OF

Charles T. Sink
Charles T. Sink Mine

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION

IN THE MATTER OF:

CHARLES T. SINK
Charles T. Sink Mine

Docket No. HOPE 75-679
Application for Review

Applicant.

STIPULATION OF FACTS

I. If a hearing were held in the captioned matter, Applicant, Charles Sink would offer testimony and other evidence to establish the following facts which MESA would not contest:

1) Charles Sink is a citizen of the United States and a resident of West Virginia. Charles Sink and his wife own a certain tract of real estate in Boggs, Webster County, West Virginia, consisting of approximately 365 acres of coal and 100 acres of surface. This property is known as the Sink Coal Company, Mine No. 1.

2) Mr. Sink and his wife acquired the tract of real estate in 1969 from Gladys Irene Ross.

3) Interstate Development Company operated a drift mine on the property under lease from Mr. Sink. Interstate abandoned the mine sometime prior to September 1973.

4) During September 1973, Mr. Sink reopened the mine as Sink Coal Company, Mine No. One.

5) Mr. Sink, with his son, Bill Sink, work underground in the mine to extract and remove the coal. Bill Sink operates a battery driven tractor and is paid on the basis of the amount of coal mined, and is treated as a partner by the owner, Mr. Sink.

6) During the period between September 1973 and November 1974, Mr. Sink and his son worked 326 days and produced 2,947 tons of coal. Peak production has not exceeded 30 tons a day. Average production was less than 10 tons per day.

7) About 90% of the coal from the Sink Mine is sold at the mine to purchasers who haul it away themselves for local consumption.

8) In October 1974, Mr. Sink contracted with an independent trucker to haul some of the coal to a site in Cowen, West Virginia, leased by Cowen Coal's Inc. That coal was stockpiled there for sale by Mr. Sink.

9) Some of the coal stockpiled at Cowen was sold to Courtney Foos on or about November 4, 1974.

10. Mr. Sink purchases all the supplies for the mine in West Virginia. Explosives are principally supplied by Independant Explosives, Inc. in Nicholas County, West Virginia. Mr. Sink uses 8-10 cases a year costing a total of about $200. Diesel fuel is principally supplied by the Union 76 dealer in Cowen, West Virginia. Mr. Sink uses about 30 barrels a year costing about $485.

11. Mr. Sink owns all the equipment used by him in the mine. It includes the following with approximate worth in parenthesis:

a) 1 Sullivan Coal Cutter ($1,000)

b) 12 B Joy Loader $3,000)

c) 100 KW Diesel Generator ($3,000)

d) 4 ft. Fan and Reliance Motor ($ 150)

e) S&S Battery powered Tractor with 4 trailers ($1,500)

All the equipment was purchased by Mr. Sink in West Virginia from individuals.

12) Mr. Sink does not know whether or not coal from his mine has been shipped out of West Virginia.

II. Both parties stipulate that

1) On November 5, 1974, Mr. James Elkins, a duly authorized representative of the Secretary of the Interior under authority of the Federal Coal Mine Health and Safety Act (hereinafter "The Act") conducted an inspection of the Sink Coal Mine.

2) As a result of that inspection Mr. Elkins issued one Notice of Violation pursuant to Section 104(c) of The Act and four Orders of Withdrawal pursuant to Section 104(c)(1) of The Act.

3) On November 13, 1974, Mr. Sink, through his attorney, William Talbott, served notice upon the Secretary of the Interior that he intended to file a Complaint against the Secretary of the Interior in the District Court for the Southern District of West Virginia seeking an injunction to restrain the enforcement by the Mining Enforcement and Safety Administration (MESA) of the notice and orders and a Declaratory Judgment that The Act does not apply to Mr. Sink's mine since it is operated soley by Mr. Sink and his son, and the average production is less than 10 tons a day. The notice also requested an administrative review under Section 105 of The Act.

4) After argument and briefs by the parties the Court, on December 5, 1974, issued a Memorandum Order directing Mr. Sink to exhaust his administrative remedies.

The Secretary of the Interior was enjoined from enforcing the notice and orders while the administrative proceeding was pending.

5) The only issues to be addressed in the administrative proceeding is 1) whether the Sink Coal Company, Mine No. 1 produces coal and is engaged in an operation that is either in commerce or affects commerce, and 2) whether an owner-operated mine is subject to the Federal Coal Mine Health and Safety Act of 1969. The parties are willing to have these issues resolved by the Administrative Law Judge on the basis of this stipulation and the documents presently in the record. Other issues that might be raised in any subsequent penalty proceeding are reserved.

III. If a hearing were held in the captioned matter the Mining Enforcement and Safety administration would offer testimony and other evidence to establish the following facts which Mr. Sink would not contest:

1) Courtney Foos is a coal broker whose principal place of business is in Norfolk, Virginia.

2) Mr. Sink made at least three separate coal sales to Mr. Foos. They were on July 27, 1974, September 25, 1974, and November 4, 1974. Sales to Mr. Foos totaled 738 tons at prices ranging between $50.00 and $60.00.

3) All of the coal sold to Mr. Foos was from the stockpile at Cowen Coal's Inc. That coal was loaded by Cowen Coal's Inc. into railroad cars. All of the coal sold to Mr. Foos went to customers of his in Pennsylvania. (Attached to this stipulation is a copy of a letter from Mr. Foos dated February 3, 1975)

4) Over 50 sales of coal from the Sink Coal Mine were to Charles Sink's son, Bill Sink.

5) Other sales were to local business establishments

such as "C&K Ford Sales", and to the County Board of Education.

6) Independent Explosives, Inc. of Nicholas County, West Virginia is the outlet for explosives manufactured in Scranton, Pennsylvania. Independent Explosives, Inc. of Nicholas County, West Virginia sells no explosives manufactured in West Virginia.

7) The Union 76 diesel fuel distribution in Cowen, West Virginia sells no diesel fuel produced or refined in West Virginia.

8) The Joy Company, manufacturer of the Joy Loading Machine used in the Sink Coal Mine, does not manufacture any loading machines in West Virginia.

9) The S&S Company, manufacturer of the S&S battery operated tractor used in the Sink Coal Mine, does not manufacture any battery operated tractors in West Virginia.

10) The Reliance Company, manufacturer of the electric motor used to drive a ventilating fan used in the Sink Coal Mine, does not manufacture any ventilating fan motors in West Virginia.

APPROVED:

/s/ John M. Allen
John M. Allen
Deputy Associate Solicitor

/s/ Robert J. Phares
Robert J. Phares
Trail Attorney

Attorneys for Mining Enforcement
and Safety Administration

/s/ William W. Talbott
William W. Talbott
Attorney for Charles T. Sink

APPENDIX G

EXCERPTS OF HEARING

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

ARLINGTON, VIRGINIA

Docket No. HOPE 75-679

Charles T. Sink

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
ARLINGTON, VIRGINIA

CHARLES T. SINK
Application for Review

Docket No. HOPE 75-679

Charles T. Sink Mine

Arlington, Virginia
February 6, 1975

The above-entitled matter came on for hearing before JUDGE JOSEPH KENNEDY, Administrative Law Judge for the Office of Hearings and Appeals, at 10:00 a.m., in Hearing Room A, Ballston Tower 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

APPEARANCES:

On Behalf of the Applicant:

WILLIAM W. TALBOTT, ESQ.

On Behalf of the Mining Enforcement and Safety Administration:

JOHN ALLEN, ESQ.
ROBERT J. PHARES, ESQ.

REPORTER: Nancy Ann Fish

44 you're selling it to local people who use it locally.

MR. ALLEN: Well, that's what we're prepared to say that a good deal of it is. We don't know how much...

JUDGE KENNEDY: Well, I know, you're just saying most of it here...

MR. ALLEN: Well, OK, yes.

JUDGE KENNEDY: ...but that's it most of it is purchased by local purchasers for local use. That's my understanding of that paragraph.

MR. TALBOTT: Well, he's the one that prepared this.

MR. ALLEN: All right, let's...I want to add, "Who haul it away themselves for local consumption.

JUDGE KENNEDY: Right.

MR. TALBOTT: I told Mr. Allen that we...after those trucks leave there we assume only that they are consuming it locally.

JUDGE KENNEDY: Well, I think you're both acting on a reasonalbe assumption unless we're going to a con...trace all those trucks. (*sic.*)

MR. ALLEN: Now, again, "most" is a little ambiguous, but I guess that's all right.

JUDGE KENNEDY: Well, could you give me...I'd like a volume figure. What percentage, Mr. Sink, do you think is sold to these local purchasers who use it locally--10 percent, 90 percent?

45 MR. TALBOTT: Well, 90 percent. We gave them a list of the dates and...

MR. ALLEN: Well, there wasn't anyway we could tell who was local and who wasn't.

MR. TALBOTT: Well, since 1973 the only one we would even contend was not local was the three purchases made to...

MR. ALLEN: To Foos.

MR. TALBOTT: ...to Foos.

JUDGE KENNEDY: All right, but your estimate, Mr. Talbott--your best estimate, and I take it it's after consulting with Mr. Sink, is about 90 of the coal from the Sink Mine is sold to local purchasers for local consumption?

MR. TALBOTT: That's correct.

JUDGE KENNEDY: All right.

MR. ALLEN: All right. That's a little more specific. What shall we say about 90 percent or 90 percent?

MR. TALBOTT: Well, it would be...

JUDGE KENNEDY: Well, about 90 percent.

MR. TALBOTT: ...that would be over that if they sat down and tried to figure it out.

JUDGE KENNEDY: And I take it it's the other ten percent you're not sure where it goes?

MR. TALBOTT: That's right. That's right.

MR. ALLEN: Yes.

JUDGE KENNEDY: And you've got other paragraph on that

. . . . .

57 MR. TALBOTT: OK.

JUDGE KENNEDY: Three conventional head and six pans, is that what that is?

MR. SINK: I'm only using one head.

JUDGE KENNEDY: You're only using one head? And one hand-held drill, you're using that?

MR. SINK: Yes.

JUDGE KENNEDY: One battery charger, DC?

MR. SINK: Yes, sir.

JUDGE KENNEDY: One two-inch pump?

MR. SINK: No, sir.

JUDGE KENNEDY: You're not using that?

MR. SINK: No, sir.

JUDGE KENNEDY: Miscellaneous cable and material?

MR. TALBOTT: He's not using it.

MR. SINK: I use some cable and some of it I don't.

JUDGE KENNEDY: All right. Well, on the basis of that, Mr. Allen, I think you can fashion it into the stipulation.

Now, on number 12, Mr. Sink does not know whether or not coal from his mine has been shipped out of West Virginia. Would that be with the exception of the coal that you sold to Mr. Foos?

MR. TALBOTT: No, we don't...

JUDGE KENNEDY: You don't know where Mr...

MR. TALBOTT: He may be...if you got something from Mr. Foos or something that says where he gets it
58 from I could see it if he says that's where it went, I'll be...

JUDGE KENNEDY: I think the Government has something on that.

MR. ALLEN: We have spoken to Foos a number of times, and that's what he has said, and that's...

JUDGE KENNEDY: What did he tell you?

MR. ALLEN: He said that it went...well, Mr. Phares has spoken to him.

MR. PHARES: I had a conversation with Mr. Foos on approximately December 23rd, and he told me that the coal that was purchased approximately on November the 4th consisted of three railroads cars of coal and that the coal was shipped to Knob Mount Scales in Cumberland, Maryland.

JUDGE KENNEDY: And who is Knob Mount Scales?

MR. PAHRES: This is a weighing station where he talked...where Mr. Foos told me that he took ownership of the coal at the time it was weighed at Knob Mount Scales in Cumberland, Maryland.

JUDGE KENNEDY: And then what did he do with it?

MR. PHARES: Then he sold it. He is a broker, and he sold it to other people.

MR. TALBOTT: And you...

JUDGE KENNEDY: Now, wait a minute. It went to the weighing station and it was weighed, and then did it go on directly to the consumers of did it got to a storage yard or what?

59 MR. PHARES: At that point Mr. Foos did not want to discuss it further. In his terms it's secrets of the trade, and he would not want to discuss...he did not want to discuss with me who he sold it to or what he did with the coal after that point. We have asked, if I might add on here, Your Honor, we have...I have asked Mr. Foos a week ago Tuesday to send us a letter telling us that...exactly what he told me on the phone that he had made three different purchases of coal and confirming where this coal went to. And he told me on the phone that all of this coal went out of the State of West Virginia.

JUDGE KENNEDY: Well, you say he did tell you it went to a weighing station in Maryland, right?

MR. PHARES: Yes, Your Honor, the last purchase on November 4th.

JUDGE KENNEDY: I see. And...but he wouldn't disclose to you where it went from there?

MR. PHARES: That's correct.

JUDGE KENNEDY: And, Mr. Sink, you say you don't know where it went?

MR. TALBOTT: No, no. It's just like we told them, Your Honor, off the record, we don't know if a man comes up there with a six or eight ton truck and...we don't know whether he dumps it off downtown or goes to New York with it.

JUDGE KENNEDY: But you told me, I think, that your invoice shows that you delivered the coal to him f.o.b. Cowens Coal yard?

60 MR. TALBOTT: That's...he buys the coal there. As far as we're concerned, it's sold. I don't know what the...

JUDGE KENNEDY: Well, what's this about he paid you on the basis of the weight determined in Maryland?

MR. TALBOTT: Well, I assume that's...whatever the weights are that's true.

JUDGE KENNEDY: I see.

MR. TALBOTT: But he buys it there. I mean, whenever he picks the coal up and takes it, I don't care what...if it was a 40-ton or 150-ton, he...it's his. He has control over it.

JUDGE KENNEDY: So as far as you're concerned, if that train had a wreck between Cowens and the loading point and the coal was lost or destroyed, he'd still have to pay you for it?

MR. TALBOTT: Yes, Well, I'd assume. He's the one that told you where it had to go and weigh it, and I don't have...

JUDGE KENNEDY: Well, I asked you a question.

MR. TALBOTT: Yes, sir. I would take that position that it was sold to him right there, and he...

JUDGE KENNEDY: Free on board at Cowens?

MR. TALBOTT: Right, sir.

JUDGE KENNEDY: And the title passed then?

MR. TALBOTT: I would take that position, sure. We
61 don't even...they know where it went to be weighed, we don't. And where it went afterward, I don't know.

MR. PHARES: Your Honor. may I further add that I had emphasized the fact to Mr. Foos that we were going to have a prehearing conference today, and I asked him to send me that letter as soon as possible so that we would be able to have that letter here today, and I assume it's...I have just checked the mailroom within the last ten minutes, and we still have not received it, but I would like permission to leave the record open so that if it is received, we could enter it in the record.

JUDGE KENNEDY: Well, as soon as it's received, yes, file it and serve it on Mr. Talbott, and reflect the parts of it that are appropriate in the stipulations, that you can agree upon.

Now, going to II of the stipulations I don't have any questions on 1, 2, 3, 4...I notice...this is just a technicality, I notice everybody keeps saying the Court entered an Order on December 5, but the copy of the Court's Order I have is dated December 6th. I assume it should be December 6th. It's in the Judge's own hand-writing--I take it that's his hand-writing?

MR. TALBOTT: Your Honor, may I approach the Bench?

JUDGE KENNEDY: Yes, surely.

MR. TALBOTT: The certified copy is December 6th,

. . . . .

77 MR. TALBOTT: Well, yes, but...

MR. ALLEN: ...but as far as we know...well, I don't know, Bob, do you?

MR. PHARES: No, we have no knowledge that it went to Baltimore.

JUDGE KENNEDY: The only knowledge you have is that it went to this weighing station in Maryland; is that right?

MR. PHARES: Yes.

MR. ALLEN: That's correct.

JUDGE KENNEDY: And until you hear from Mr. Foos you don't know where it went after that?

MR.PHARES: That's correct.

MR. ALLEN: Yes, this is as much as we can say on the basis of our present knowledge.